INDEX

Table of Authorities Cited

Cases:

Statutes:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 20

CARNATION COMPANY,

Petitioner,

v.

PACIFIC WESTBOUND CONFERENCE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS FAR EAST CONFERENCE, ET AL.

The Question Presented

Since we do not agree that the narrow issue in this case is brought into proper focus by petitioner's lengthy statement of questions, we would restate the question presented as follows:

> Was the complaint herein, which seeks antitrust damages for enhancement of ocean freight rates through unlawful concerted action of ocean common carriers, properly dismissed below on the ground that the complete program of the Ship-

ping Act, 1916, for the substantive (§15) and remedial (§22) regulation of ocean carrier agreements superseded, *pro tanto*, the antitrust laws, and exclusive jurisdiction of claims for violation of the Shipping Act resides in the Federal Maritime Commission?

Statement of the Case

We do not quarrel with the Government's statement of the case except insofar as it includes a paraphrase of §15 of the Shipping Act which assumes the conclusion which the Government urges upon this Court (Brief, p. 5). However, there are two points which petitioner makes with respect to the facts which deserve comment.

Petitioner (Brief, pp. 9-10) emphasizes that respondents "have elected to proceed without creating issues of fact". This, of course, is always true when a defendant moves to dismiss a complaint on the ground that it fails to state a claim upon which relief may be granted. The sufficiency of the complaint can only be tested by assuming, for the purposes of the motion to dismiss, that the facts well pleaded in the complaint are true. If the granting of the motion to dismiss is upheld, no further pleading by the defendants will be required. If, on the other hand, the decision below should be reversed, the defendants will, under Rule 12(a) of the Federal Rules of Civil Procedure, have their opportunity to make appropriate denials of matters alleged in the complaint and to assert affirmative defenses.

More important is the matter of the nature of the claim made in the complaint. Petitioner does state (Brief, p. 6): "The gist of the complaint is that by an unapproved agreement the defendants increased the rate for carriage by water from the Pacific Coast to Manila by $2.50 per ton, and plaintiff [petitioner], a shipper of evaporated milk, was forced to pay this increase." That this is the gravamen of the complaint we heartily agree, and a fair reading of the complaint—particularly paragraphs 18, 21, 22, 24, 25, 26, 28, 29 and 30 thereof (R. 19-25)—can lead to no other conclusion. However, at various points (*e.g.*, Brief, pp. 74 and 92) petitioner seeks to characterize the proceeding as a simple overcharge case. This it does in an effort to obtain excessive benefits from the holding in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922)—a case which involved no question regarding the antitrust laws or their relationship to a regulatory statute. It should be readily apparent that petitioner would have no basis for proceeding under the antitrust laws if it were merely seeking to recover the difference between the tariff rate and some excess over the tariff rate. It is only by claiming that the tariff rate itself was unduly enhanced by unlawful concerted action that petitioner can lend even the color of antitrust violation to its claim.

No matter how petitioner may struggle to free itself from the confines of its own complaint, it must inevitably return to the simple issue put forward in our statement of "The Question Presented."

The abrupt reversal of the "Government" position in this case following the decision of the Court of

Appeals is worthy of note on account of its implications in the event that the *rationale* of the decision below should not be upheld. In the District Court, the Commission[1] intervened "for the purpose of moving this [the District] Court to dismiss the complaint herein" (R. 33). The Commission's motion was placed "on the ground that the Shipping Act * * * provides the exclusive remedy for the wrongs alleged in the complaint and therefore this honorable Court is without jurisdiction in this matter." (R. 34-35). The Commission, as an appellee, also argued to the United States Court of Appeals for the Ninth Circuit that the complaint should be dismissed.

Thus, until the case arrived at this Court, the Commission followed a consistent course dating back at least to *Far East Conference* v. *United States, infra.*

---

[1] The United States Shipping Board was the agency which was established by § 3 of the Shipping Act, 39 Stat. 729, and which was charged with the administration of that Act. Subsequently, by Executive Order No. 6166, June 10, 1933, § 12 (set out in note under 5 U. S. C. A. § 132), the United States Shipping Board was abolished and its functions were transferred to the Department of Commerce. Thereafter, by the Merchant Marine Act, 1936, 49 Stat. 1985, the United States Maritime Commission was created and the functions of administering the Shipping Act were transferred to it. The functions of the United States Maritime Commission were transferred to the Federal Maritime Board, pursuant to the provisions of the Reorganization Act of 1949, 63 Stat. 203-207, 5 U. S. C. §§ 133(z) to 133(z)-15, and Reorganization Plan No. 21 of 1950, 15 F. R. 3178, 5 U. S. C. A. following § 133(z)-15. Finally, by Part I of Reorganization Plan No. 7 of 1961, 26 F. R. 7315, 75 Stat. 840, effective Aug. 12, 1961, as amended by Pub. L. 88-426, Title III, § 305(19) (Aug. 14, 1964), 78 Stat. 425, the Federal Maritime Commission was created and to it were assigned the regulatory functions under the Shipping Act, 1916, as amended. See note following 46 U. S. C. A. § 1111, 1965 pocket supplement. Whenever herein it will serve to avoid confusion, we refer to the Commission and its predecessors as "the Commission."

There, in the District Court, the Commission intervened in order to urge dismissal of the Attorney General's antitrust complaint on the grounds of supersession of the antitrust laws and exclusivity of the administrative remedy under the Shipping Act. *United States* v. *Far East Conference,* 94 F. Supp. 900, 902 (D.N.J. 1951). When this Court granted a writ of certiorari to review the District Court's denial of the motion to dismiss, the Commission argued, with the aid of special counsel, that the District Court's order should be reversed and the complaint should be dismissed. *Far East Conference* v. *United States,* 342 U.S. 811 (1951) and 342 U.S. 570, 571, 572 (1952).

During the three years of Congressional activity touched off by *Federal Maritime Board* v. *Isbrandtsen,* 356 U.S. 481 (1958), the Commission on at least two occasions asserted to committees of the Congress the exclusivity of its jurisdiction over agreements of common carriers by water in the foreign commerce of the United States. In the course of the investigation conducted by the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, in 1959, Commission representatives were questioned on the matter of supersession and were invited to submit a memorandum of their legal position.[2] The memorandum, over the signature of the Commission's General Counsel at that time, E. Robert Seaver, Esq., was printed in the transcript of the Hearings.[3] The memorandum shows only staunch and well-reasoned

[2] "Monopoly Problems in Regulated Industries." *Hearings Before the Antitrust Subcommittee (Subcommittee No. 5) of the Committee on the Judiciary, House of Representatives,* 86th Cong., 1st Sess. (1959), Part 1, Vol. I, Serial No. 14, pp. 68-70, 77, 904.

[3] *Id.*, pp. 926-938.

adherence to the position taken by the Commission and vindicated in *Far East Conference*.

Again, after draft legislation before the Committee on Merchant Marine and Fisheries of the House of Representatives proposed to subject ocean carriers to the penalties not only of the Shipping Act, but also of the antitrust laws,[4] the Chairman of the Commission urged the elimination of this language, which he condemned for its introduction of a dual and inconsistent regulatory scheme (*infra*, pp. 59-64). Again the Commission's position was vindicated. Cf. § 2 of Pub. L. 87-346 (October 3, 1961), 75 Stat. 763, 764.

Speculation as to why, when it is subjected to the harmonizing ministrations of the Solicitor General, the Commission (Brief, p. 11) suddenly "takes no position" (but has its attorneys subscribe to a brief which reverses its position in the courts below), may be of interest to a student of the independence of the "independent" regulatory agencies, but probably has no direct bearing upon the issue at hand. However, the collision between the Commission and the Solicitor General serves to emphasize the necessity of maintaining the complete integrity of the doctrine of supersession of the antitrust laws in matters within the ambit of the Shipping Act. If, as we contend, Congress substituted a program of regulated agreements, in the case of ocean carriers, for the outright prohibitions of the antitrust laws, with the regulation to be done by the Commission, then the Department of Justice need not concern itself with a duplicate regu-

[4] H. R. 4299, § 2, Draft Revision No. 2 [Committee Print] (April 13, 1961), set forth in *Index to the Legislative History of the Steamship Conference/Dual Rate Law*, Sen. Doc. No. 100, 87th Cong., 2d Sess. (1962) 78.

latory program under antithetical statutory commands.[5] Its only function is to administer the prosecution of criminal and civil penalty proceedings under the *Shipping Act*, and *after the Commission* has determined that violations of *that Act* have occurred. To the extent that private treble damage suits are intended to constitute the injured public as a sort of auxiliary police to gun down *antitrust* violators, they are equally inconsistent with the program enacted by Congress for the regulation of ocean carrier agreements and for the awarding of damages to those injured by violations of that regulatory program.

Statutory Provisions Involved

For the convenience of the Court, we set forth as Appendix A hereto the complete provisions of §§ 15 and 22 of the Shipping Act, 1916, omitting amendments enacted after the transactions here involved occurred.

SUMMARY OF ARGUMENT

I

In *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408 (1932), this Court held that an antitrust complaint of a private party seeking an injunction against concerted activity

[5] Regarding the unwisdom of conferring upon the antitrust-oriented Department of Justice the power to gag regulatory agencies in litigation, see Auerbach, *The Isbrandtsen Case and Its Aftermath, Part II*, 1959 Wis. L. Rev. 369, 387-8 f.n. 287. Professor Auerbach was, as stated in the first footnote to Part I of his article, co-counsel for petitioners Japan-Atlantic and Gulf Freight Conference and its members in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958).

of common carriers by water had properly been dismissed on the ground that complete relief, both substantive and procedural, was provided under the Shipping Act, which *pro tanto* superseded the antitrust laws. This was held to be so whether or not the agreement for the concerted action had been filed with, or approved by the Commission. 284 U.S. at 485-487. Under the Shipping Act, primary jurisdiction was in the Commission, subject to judicial review under that Act.

Again in 1952 this Court held that the antitrust laws had been superseded by the Shipping Act and that primary jurisdiction of cases under the Shipping Act was in the Commission. This was the holding of *Far East Conference* v. *United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576. The only distinction which was attempted to be drawn in *Far East Conference* between that case and *United States Navigation Co.* was that in *Far East Conference* it was the Government which sought an injunction under the antitrust laws, whereas *United States Navigation Co.* was a suit by a private party. The purported distinction was rejected (342 U.S. at 576).

Prior to the instant case another circuit had occasion to pass on the question whether the Shipping Act had superseded the antitrust laws for the purpose of private suits for damages as well as suits seeking injunctive relief. In *American Union Transport* v. *River Plate & Brazil Conferences*, 126 F. Supp. 91 (S.D.N.Y. 1954), aff'd on opinion below, 222 F. 2nd 369 (2d Cir. 1955), it was held that a freight forwarder seeking treble damages under the antitrust laws on the ground that the defendant carriers had by

an unapproved agreement conspired to deny brokerage to the plaintiff, was not entitled to antitrust relief but must proceed for the relief afforded by the Shipping Act. The complaint was accordingly dismissed. The court's decision, like that of the courts below in the present proceedings, was predicated upon *United States Navigation Co.* and *Far East Conference,* notwithstanding the efforts of the plaintiff to distinguish those cases on the ground that they involved injunctive relief, whereas *American Union Transport* was seeking damages.

Petitioner's effort to infer from *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 78 S.Ct. 851, 2 L.Ed. 2d 926 (1958), a dilution of the doctrine of *United States Navigation Co.* and *Far East Conference* is without foundation. That case, which came into court on a petition to review a Commission order of approval under § 15 of the Shipping Act, involved no question of supersession. The disagreement between the majority and the dissent of Mr. Justice Frankfurter, regarding the implications of the primary jurisdiction doctrine for the question of illegality *per se* of contract rate systems, has no relevance for the issue of supersession, and the majority broadened rather than narrowed the scope of the Commission's primary jurisdiction under the Shipping Act.

On the basis of precedent, the decision below would appear to have been compelled by *United States Navigation Co.* and *Far East Conference,* and is in harmony with the Second Circuit decision in *American Union Transport.*

II

The decision below was correct in principle as well as on the basis of precedent. The numerous decisions cited by petitioner as evidence of the narrowing of the supersession doctrine were all decided in connection with the accommodation between the antitrust laws and regulatory statutes other than the Shipping Act. In each of those decisions there may be discerned the absence of one of the conditions upon which supersession is based. The regulatory statute did not substantively deal with the factual situation presented; or it did not provide any remedy in the premises; or Congress clearly manifested a purpose that the regulatory scheme was not to supersede antitrust jurisdiction over competitive and anti-competitive practices in the particular industry.

Section 15 of the Shipping Act catalogs types of agreements of ocean carriers as those types were found to exist during the course of a two year congressional investigation of ocean carrier agreements. It requires the filing of all such agreements with the Commission. It makes it unlawful to carry out an agreement which has not been filed with and approved by the Commission. At the relevant times it provided a civil penalty of $1,000 per day for each violation of § 15. There can be no question but that the substantive requirements of § 15 of the Shipping Act encompass the conduct of the respondents alleged in the complaint herein.

Section 22 of the Shipping Act authorizes the Commission, upon a complaint charging a violation of the

Shipping Act and seeking reparation for the injury caused thereby, to direct the payment of full reparation for such injury. Thereby the Shipping Act provides its own remedy for the purpose of making whole a party injured by a violation of the substantive provisions of the Act.

Thus the prerequisites for supersession, *i.e.*, that there be an all-pervasive regulatory scheme, and the provision of a remedy for its violation, are met in the present case. These factors are reinforced by the absence from the Shipping Act of provisions found in many other regulatory statutes which specifically preserve for parties claiming injury at the hands of members of the regulated industry the right to pursue in court their remedies at common law or under other statutes. Congress has never more clearly than in the Shipping Act indicated the purpose of committing the regulation of an industry and, specifically, its agreements in any way restricting competition, to the exclusive jurisdiction of an administrative agency created for that very purpose.

III

The 1914 report of the House Merchant Marine and Fisheries Committee, which, after two years of investigation by the Committee, set the stage for the drafting and enactment of the Shipping Act, 1916, clearly evinces the Committee's recognition that the solution of the problems created by agreements among ocean carriers was to be found, not in the application to such agreements of the antitrust laws, but rather in the subjection of such agreements to regulation by an administrative agency which would be able, under

the criteria set forth for its guidance, to assure to the public the benefits of the many good features of such agreements while protecting the public against the several bad features which the Committee found to exist. Such a regulatory purpose could not possibly be achieved by subjecting the industry to the pulling and hauling of simultaneous commands under such diametrically opposed enactments as the Shipping Act and the antitrust laws.

During the 1961 proceedings which led to substantial amendments of the Shipping Act, including § 15 thereof, attempts were made to amend the final paragraph of § 15 to make the specific penalty for violation thereof cumulative "to the penalties provided by the antitrust laws". After testimony on this version of the bill, the penalty provision of § 15 was relieved of this new concept. In the bill which was finally passed the penalty provided in § 15 remains exclusive. The legislative history of Pub. L. 87-346 may be regarded as an endorsement of the philosophy of *United States Navigation Co.* and *Far East Conference.*

ARGUMENT

I. The Decision Below Appears Consistent With, If Not Required By, Precedent.

A. On both prior occasions when the issue was before it, this Court held the Shipping Act to have superseded *pro tanto* the antitrust laws.

Preliminarily we emphasize, as petitioner itself has stated (Brief, page 6), that the gravamen of the present complaint is that by an unapproved agreement the respondents enhanced the rate charged to petitioner for the transportation of evaporated milk from United States Pacific Coast ports to Manila. It is solely by virtue of the claim that there was enhancement of the rate *by illegal agreement* that petitioner has sought to enrich itself by seeking the treble damage remedy of the antitrust laws, rather than making a timely complaint for reparation under the Shipping Act.

On two occasions, separated by a period of twenty years, this Court has been called upon to determine whether anti-competitive practices of ocean carriers are subject to the antitrust laws. On both occasions this Court has said that they are not, and that they are exclusively subject to the provisions of the Shipping Act, 1916, and specifically § 15 thereof (39 Stat. 733, 46 U.S.C. §814).

In *United States Navigation Co.* v. *Cunard Steamship Co., Ltd.*, 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408 (1932), the bill in equity of one ocean carrier charged

that the respondent ocean carriers had established a contract rate system which coerced shippers to patronize them exclusively and, consequently, excluded complainant from the trade. An injunction against the conduct of the respondents was sought under the Sherman Act and the Clayton Act.

This Court affirmed the decree below, which had dismissed the bill. It did so notwithstanding that the bill asserted that the agreement of the respondents had not been filed with the Commission.

After reviewing the pertinent provisions of the Shipping Act this Court stated (284 U.S. at 485-487):

> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and *the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws.* Compare *Keogh* v. *Chicago & N. W. Ry. Co., supra,* at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board.
>
> * * *
>
> "There is nothing in §15 of the Shipping Act which militates against the foregoing views. That section requires that agreements between carriers, or others subject to the act, in respect of a number of enumerated matters, or 'in any manner providing for an exclusive, preferential, or coöp-

erative working arrangement,' shall be filed immediately with the board; and that the term 'agreement' shall include understandings, conferences, and other arrangements. Thereupon, the board is authorized to disapprove, cancel or modify any such agreement, 'whether or not previously approved by it,' which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., 'or to operate to the detriment of the commerce of the United States, or to be in violation of this Act.' *But a failure to file such an agreement with the board will not afford ground for an injunction under §16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government —since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist. If there be a failure to file an agreement as required by §15, the board, as in the case of other violations of the act, is fully authorized by §22, supra, to afford relief upon complaint or upon its own motion.* Its orders, in that respect, as in other respects, are then, under §31, *for the first time,* open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limitations announced by this court in respect of like orders made by the Interstate Commerce Commission." (Italics supplied.)

It would be difficult to conceive of a clearer holding that all charges of illegal concerted activities of common carriers by water constitute charges of violation

of the Shipping Act, and specifically, §15 thereof, *and not* charges of violation of the antitrust laws. No more clearly could it be stated that the rule applies whether the agreement or combination or working arrangement is claimed to have been filed with the Commission or not.

In view of the cautious reservation in the *United States Navigation Co.* opinion regarding the rights of the Government, it is not too surprising that in 1948 the Government instituted a civil antitrust action seeking an injunction against the use by the Far East Conference of a contract rate system. There, too, it was contended that the concerted action did not attain exemption from the antitrust laws because no agreement had been filed with or approved by the Commission. One of the grounds on which the District Court denied the motions of the Conference and of the Commission to dismiss the complaint was that the exemption from the antitrust laws created by §15 of the Shipping Act is a narrow one, limited to agreements lawful under §15 (*United States* v. *Far East Conference,* 94 F. Supp. 900, 902-903 (D.N.J. 1951)).

The District Court decision was reversed with directions to dismiss the complaint in *Far East Conference* v. *United States,* 342 U.S. 570, 72 S. Ct. 492, 96 L. Ed. 576 (1952). This Court stated the question before it and the basis for its answer as follows (342 U.S. at 573):

> "At the threshold we must decide whether, in a suit brought by the United States to enjoin a dual-rate system enforced in concert by steamship carriers engaged in foreign trade, a District Court can pass on the merits of the complaint before the

> Federal Maritime Board has passed upon the question. We see no reason to depart from *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474. That case answers our problem."

The Court pointed out that the sole factual distinction between *United States Navigation Co.* and the case before it was that in the earlier suit it was a private party who invoked the antitrust laws, whereas in *Far East Conference* the suit was brought by the Government. Regarding this distinction the Court said (342 U.S. at 576):

> "The sole distinction between the *Cunard* case and this is that there a private shipper invoked the Antitrust Acts and here it is the Government. This difference does not touch the factors that determined the *Cunard* case. The same considerations of administrative expertise apply, whoever initiates the action. The same Antitrust Laws and the same Shipping Act apply to the same dual-rate system. To the same extent they define the appropriate orbits of action as between court and Maritime Board."

It thus appears that this Court was not inclined to confine the doctrine of *United States Navigation Co.* or to avoid its application on the basis of labored efforts at distinction. The antitrust laws have been superseded as to one category of suitor. They were also superseded as to any party entitled to proceed before the Commission under the Shipping Act.

We submit that it follows equally logically that if the Shipping Act has superseded the antitrust laws, it has done so both with respect to suits seeking injunc-

tive relief and with respect to suits seeking damages. This is true because the Commission, upon a proper complaint, is authorized to afford either kind of relief under §22 of the Shipping Act, and to subject ocean carriers to punitive damages for violation of the anti-trust laws would destroy the unitary and quite different regulatory program of the Shipping Act.

Our contention that *United States Navigation Co.* and *Far East Conference* govern the present case notwithstanding the difference in relief sought, is supported by *American Union Transport* v. *River Plate & Brazil Conferences,* 126 F. Supp. 91 (S.D.N.Y. 1954), aff'd on opinion below, 222 F. 2d 369 (2d Cir. 1955). There, a freight forwarder claimed that the defendant conference and its members had, without requisite approval under §15 of the Shipping Act, agreed that none of the conference members would pay to the plaintiff a brokerage commission on particular shipments. The defendants moved to dismiss. The motion was granted, notwithstanding efforts of the plaintiff to distinguish *United States Navigation Co.* and *Far East Conference* on the ground that they involved complaints for *injunctions* regulating future conduct rather than suits for *damages* based on past conduct, and notwithstanding the further effort of the plaintiff to elevate the dissenting opinion in *Far East Conference* (342 U.S. at 578) to the status of a rule of law. After quoting from the opinion in *United States Navigation Co.,* the court said (126 F. Supp. at 93):

> "The failure to file an agreement, therefore, whatever other effect such failure may have, does not leave the offending parties 'at large', subject to

the antitrust laws. If there is any inconsistency apparent between this conclusion and the language of §15 of the Shipping Act, as pointed out by Mr. Justice Douglas, the clear language of the Supreme Court authoritatively compels the decision."

Thus both the courts below and the United States Court of Appeals for the Second Circuit have interpreted *United States Navigation Co.* and *Far East Conference* as precluding suits for treble damages under the antitrust laws against parties whose agreements are within the substantive coverage of §15 of the Shipping Act.

B. The doctrine of United States Navigation Co. and Far East Conference has not been abandoned or diluted as contended by the petitioner.

Here, as in the courts below, petitioner argues (Brief, pp. 86-92) that *Federal Maritime Board* v. *Isbrandtsen Company,* 356 U.S. 481 (1958), seriously weakened or destroyed the holdings of *U.S. Navigation* and *Far East Conference.* Petitioner candidly states (Brief, p. 86) that *Federal Maritime Board* v. *Isbrandtsen* was not a "primary jurisdiction case". What should be emphasized is that it was not a *supersession* case. The antitrust laws were not involved, since the case arose on a petition to review an order of the Board granting an approval under §15 of the Shipping Act.

In essence, petitioner's argument seeks to extract from the dialogue between the majority and the dissenters in *Federal Martime Board* v. *Isbrandtsen* such

a debilitation of the primary jurisdiction doctrine as to knock out one of the props common to the supersession and primary jurisdiction doctrines, *i.e.*, the desirability of having a panel of experts, created for that purpose, adjudicate technical questions in the economic regulation of an industry subjected to a specific regulatory statute. Petitioner's argument is wide of the mark because of its failure to appreciate the argument made to this Court by the petitioner, the Japan-Atlantic & Gulf Freight Conference, in *Federal Maritime Board* v. *Isbrandtsen,* to which the cited portions of the majority and of the dissenting opinions were directed. It will be recalled that in *Federal Maritime Board* v. *Isbrandtsen,* the Board's order approving a contract rate system of the Japan-Atlantic & Gulf Freight Conference (hereinafter, "JAGFC"), had been set aside on the petition of Isbrandtsen on the ground that the contract rate system was illegal *per se* under §14 Third of the Shipping Act, 1916, 39 Stat. 733, as amended (46 U.S.C. §812 Third). *Isbrandtsen Company* v. *United States,* 99 App. D.C. 312, 239 F. 2d 933 (1956).

On certiorari to review the decision of the Court of Appeals, the petitioners argued that *U.S. Navigation Co.* and *Far East Conference* precluded a holding that the contract rate system was illegal *per se.* See, *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U.S. 481, 496. The argument is fully spelled out in the brief for JAGFC, petitioner in No. 74, October Term, 1957, of this Court, at pp. 50-57. It was there pointed out that *U.S. Navigation Co.* and *Far East Conference* both arose on complaints in equity for injunctions under the antitrust laws against the continuation of contract rate systems. In both cases, the complaints

were ordered dismissed, notwithstanding that in both cases it had been argued that contract rate systems were prohibited by the Shipping Act and, therefore, were incapable of approval. JAGFC contended that under appropriate principles of pleading, the complaints in those cases would not have been dismissed if a claim for court relief had been stated, either under the antitrust laws or under the Shipping Act. Since the opinion in *U.S. Navigation* particularly referred to *Great Northern Ry. Co.* as not calling for dismissal of court proceedings and resort to administrative remedies where there is only an issue of law involved, JAGFC argued that the dismissal of the complaints in *U.S. Navigation* and in *Far East Conference,* of necessity, meant that this Court was of the view that, under appropriate facts and circumstances, contract rate systems would not be unlawful and could be approved by the Board.

Against this background, it appears that the majority in *Federal Maritime Board* v. *Isbrandtsen* did, in theory at least, accept the JAGFC argument and reject the holding of the Court of Appeals that contract rate systems were unlawful *per se.* Thus the majority stated (356 U.S. at 499):

> "This consideration, moreover, is particularly compelling in light of our present holding. Since, as we hold, §14 Third strikes down dual-rate systems only where they are employed as predatory devices, then precise findings by the Board as to a particular system's intent and effect would become essential to a judicial determination of the system's validity under the statute. In neither *Cunard* nor *Far East Conference* did the Court have the assistance of such findings on which to

base a determination of validity. We conclude, therefore, that the present holding is not foreclosed by these two cases."

Thus, the unlawfulness of contract rate systems appears to have been made to depend on the findings of the administrative agency in the particular case with respect to the impact of the proposed contract rate system upon outside competition.

The dissenting opinion (356 U.S. at 500, *et seq.*) of Mr. Justice Frankfurter, who had written the majority opinion in *Far East Conference,* consists in part of a disagreement with the majority as to the practical consequences of its decision. Looking at the realities of competitive practices in ocean transportation, Mr. Justice Frankfurter was of the opinion that the majority had, in fact, not laid down a criterion under which some contract rate systems might be lawful and others unlawful, since there was every reason to believe that the same findings as were made in the case of JAGFC would have to be made in any case involving a contract rate system (356 U.S. at 502-503). Thus, he reasoned, the majority had held contract rate systems to be illegal *per se,* and, in so doing, had failed to take account of the tenet of the primary jurisdiction doctrine which precludes the doctrine from ousting a court of jurisdiction *under the regulatory act* when there is only a pure question of law involved (356 U.S. at 517-523).

Viewed against the background of the contentions as to illegality *per se* under the Shipping Act, it is clear that the majority in *Federal Maritime Board* v. *Isbrandtsen* adhered to the primary jurisdiction doc-

trine, and that the dissent took the majority to task for indirectly extending that doctrine to cover cases which could be decided by the courts on a pure question of law.[6] Nothing in all of this involved the *supersession* doctrine, since that case was in court on a properly grounded petition for review of an order of approval under §15 of the Shipping Act. The case presented no problem of judicial jurisdiction under the antitrust laws *vis-a-vis* administrative jurisdiction under the Shipping Act.

Petitioner also seeks support for its contention that *United States Navigation Co.* and *Far East Conference* have become debilitated by reference to great numbers of cases decided within the context of regulatory statutes other than the Shipping Act. This approach ignores the salient features of the Shipping Act upon which the holdings of supersession by that Act have been grounded—features which were not present in the same combination in other regulatory statutes with respect to which supersession has been held to apply to a limited extent or not at all.

The following attributes of the Shipping Act combine to make appropriate the broadest application of the supersession doctrine in shipping matters:

1. Section 15 of the Shipping Act requires the filing with the Commission and its approval or disapproval of every conceivable agreement among ocean carriers which provides for the establishment of rates or in any other respect de-

[6] A searching analysis of the implications of *Federal Maritime Board* v. *Isbrandtsen* for the primary jurisdiction doctrine appears in Auerbach, *The Isbrandtsen Case and Its Aftermath, Part II*, 1959 Wis. L. Rev. 369, 374-386.

stroys, limits or affects competition. It even encompasses such broad categories of agreements as a "cooperative working arrangement", which may or may not affect competition among the parties. Section 15 erects the standards by which the Commission must disapprove agreements. It provides a severe civil penalty for violations. It may be noted that one of the standards for disapproval is a finding that the agreement is in violation of the Shipping Act, and that thus a carrier agreement is vulnerable to disapproval not only if it runs afoul of the criteria of §15 itself, but also if it violates any of the other commands of the Shipping Act.

2. Section 22 of the Shipping Act authorizes the Commission, on a sworn complaint filed by any person, to investigate any violation of the Shipping Act and to make such order as the Commission deems proper. If the complaint asks reparation for injury caused by a violation of the Shipping Act, the Commission is authorized to direct the payment of full reparation for such injury.

3. Nowhere in the Shipping Act is there any provision authorizing suit in court for violations of the Shipping Act or saving to suitors their remedies under other statutes or at common law.

A case which illustrates the effect for the purposes of the supersession doctrine of the absence of one or more of the above features in a regulatory statute is *S.S.W. Inc.* v. *Air Transport Ass'n of America*, 89 App. D. C. 273, 191 F. 2d 658 (1951). There one air carrier sought both injunctive relief and treble dam-

ages under the antitrust laws against other air carriers and their trade association. The District Court for the District of Columbia had ordered the complaint dismissed on the ground that the subject matter was covered by the Civil Aeronautics Act and that the case was therefore within the primary jurisdiction of the Civil Aeronautics Board.

On appeal, the Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court and remanded the cause for retention by the District Court while the appellant sought its remedies from the C.A.B. In reaching this result, the court fully recognized the scope and purpose of the supersession doctrine of *United States Navigation Co.* (191 F. 2d at 661-663). Comparing the substantive provisions of the Civil Aeronautics Act with the allegations of the complaint, the court concluded that the Act covered the dominant facts alleged as constituting violations of the antitrust laws. It followed that, since the C.A.B. had power to issue cease and desist orders against unfair methods of competition and deceptive practices and to approve or disapprove contracts and agreements among air carriers, the appellant must proceed before the C.A.B. and not in court in seeking injunctive relief (191 F. 2d at 662-663). The court specifically noted that absence of C.A.B. approval of the agreements and understandings charged in the complaint did not alter this conclusion. At this point it quoted the material from *United States Navigation Co.*, 284 U.S. at 487, which we have quoted, *supra*, at pp. 14-15 hereof.

However, the court also concluded that the appellant was not deprived of its right to seek treble damages

for violations of the antitrust laws and that, after the C.A.B. had made its determination, the appellant would be entitled to proceed under the antitrust laws except as to matters within the C.A.B.'s jurisdiction which the C.A.B. should find to be legal under the Civil Aeronautics Act. In reaching its conclusion regarding the damages aspect of the complaint, the court stated (191 F. 2d at 663-664):

> "The prayer for treble damages under the antitrust laws raises a different problem. *The Civil Aeronautics Act, unlike* the Interstate Commerce Act and *the Shipping Act, does not authorize the award of damages by the Board for violation of its provisions.* Where specific damage provisions are contained in regulatory statutes, it has been held that there may be no recovery of treble damages under the antitrust laws. And this even in a statute such as the Interstate Commerce Act which contains a clause saving all preexisting remedies at common law or by statute. Here, however, we have both a saving clause, which provides that 'Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies' and a statute which conspicuously makes no provision for damages. *Reading the saving clause in the light of congressional failure to provide a remedy for damages in the Civil Aeronautics Act, we conclude that Congress did not intend to deprive an air carrier of its right to seek treble damages for violations of the antitrust laws.* This accords with the Supreme Court's determination that it could grant injunctive relief under the antitrust laws against a combination of rail-

> roads under circumstances where the Interstate Commerce Commission was not authorized to grant comparable relief." (Italics supplied.)

The selective application of supersession in *S.S.W., Inc.*, based upon the administrative power to enjoin under the aviation legislation and the lack of administrative power to award damages for violation of that legislation, was implicitly adopted by this Court in *Pan American World Airways* v. *United States*, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963). There the Attorney General had instituted a civil antitrust suit at the instance of the C.A.B. This Court determined that the transactions charged as antitrust violations were "precise ingredients of the Board's authority" in administering substantive provisions of the aviation legislation (371 U.S. at 305). Turning to the remedial powers of the Board, the Court concluded that they were adequate to deal with any violations of the aviation legislation which a Board investigation might disclose (371 U.S. at 311-312). In reaching this latter conclusion this Court noted that "The Board has no power to award damages or to bring criminal prosecutions".

This Court concluded that the antitrust complaint in *Pan American World Airways* should be dismissed. In footnote 19 to the opinion (371 U.S. at 313) the Court said:

> "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course. See *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474; *Far East Conference* v. *United States*, 342 U.S. 570, 577."

Thus, in 1963, was the current vigor of *United States Navigation Co.* and *Far East Conference* explicitly acknowledged.

When this underlying explanation of the application of the supersession doctrine in some cases, but not in others, is understood, the irrelevance of cases decided with respect to regulatory statutes other than the Shipping Act becomes clear. A brief analysis of the statutes involved in other cases will illustrate this point.

The Federal Trade Commission Act, 38 Stat. 717, as amended (15 U.S.C. §§41-58), is distinguishable by reason of the express statement in §11 thereof, 38 Stat. 724 (15 U.S.C. §51), that nothing therein shall be construed to prevent or interfere with the enforcement of the antitrust laws, etc., or to alter, modify, or repeal the antitrust laws.

The Communications Act of 1934, 48 Stat. 1064, as amended 47 U.S.C §§151-609, specifically authorizes suits in court for recovery of damages (§207, 48 Stat. 1073, 47 U.S.C. §207); and provides for a degree of applicability of the antitrust laws to licensed carriers subject to the Act (§313, 48 Stat. 1087, 47 U.S.C. §314).

The Natural Gas Act, 52 Stat. 821, 15 U.S.C. §§717-717w, provides for dual enforcement. Section 13, 52 Stat. 827, 15 U.S.C. §717l, provides for petitions to the Federal Power Commission. Section 22, 52 Stat. 833, 15 U.S.C. §717u, provides for suits in United States District Courts for enforcement of any liability or duty created by, or to enjoin any violation of, the Act.

A few cases cited by the petitioner and the Government deserve mention because they are quite in accord with our analysis and do not in any degree detract from the applicability of the supersession doctrine to the case at bar.

In *United States* v. *Borden Co.*, 308 U.S. 188, 60 S. Ct. 182, 84 L. Ed. 181 (1939), an indictment had been found against dairy farmers, distributors of milk, leaders of a union of milk truck drivers, and officials of the City of Chicago, charging that the defendants had conspired to fix the price to be paid to members of an association of milk producers for milk to be distributed in the City of Chicago.

The District Court sustained an attack upon the indictment on the ground that under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 248 (7 U.S.C. §§ 671-674) and its predecessor Acts, the Cooperative Marketing Act of July 2, 1926, 44 Stat. 802 (7 U.S.C. §§ 451-457), and the Agricultural Adjustment Act of 1933, 50 Stat. 246 (7 U.S.C. §§ 601-659), as well as under the Capper-Volstead Act, 42 Stat. 388 (7 U.S.C. §§ 291-292), the questions presented in the indictment were required in the first instance to be passed upon by the Secretary of Agriculture under an application of the supersession and primary jurisdiction doctrines.

This Court disapproved of the ruling of the District Court so far as concerns the Capper-Volstead Act, on the ground that the latter Act applied only to farmers and did not profess, under any circumstances, to give validity to combinations among farmers, distributors, labor union officials and city officials. The

Court ruled that, here, to use the expression adopted in *Terminal Warehouse Co.* v. *Pennsylvania R.R. Co.*, 297 U.S. 500, 515-516, 56 S. Ct. 546, 80 L. Ed. 827 (1936), was "a circumambient conspiracy". In this connection the Court said (308 U.S. at 204-205):

> "The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise. *In this instance, the conspiracy charged is* not that of merely forming a collective association of producers to market their products but *a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area,* and thus in effect, as the indictment is construed by the court below, 'to compel independent distributors to exact a like price from their customers' and also to control 'the supply of fluid milk permitted to be brought to Chicago.' 28 F. Supp. 180-182. Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in § 1 of the Capper-Volstead Act." (Italics supplied.)

This Court disposed of the contention that the application of the supersession doctrine was required by the provisions of the Agricultural Marketing Agree-

ment Act and its predecessor Acts upon the ground that those Acts, while validating agreements among farmers and handlers of agricultural products of a specified type if the Secretary of Agriculture should become a party thereto (the Secretary had not become a party to the agreement in question), did not go further and condemn as illegal or provide a punishment for agreements which had not thus been validated. In this respect, the Agricultural Marketing Agreement Act and its predecessor Acts differed distinguishably and sharply from the Shipping Act. Section 15 of the Shipping Act (46 U.S.C. § 814), while validating agreements of the specified types which should receive the approval of the Board, also condemns all such agreements which are not so approved and stamps them as illegal and provides the punishment therefor. That this is the distinction which this Court had in mind appears from the following language in *Borden* (308 U.S. at 200):

> "That the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched."

The Shipping Act not only specifies what agreements are valid but does "impinge" upon the prohibitions and penalties of the Sherman Act by specifically condemning private action in entering into agreements which have not been approved by the Board.

Petitioner also relies on *United States Alkali Export Association, Inc.* v. *United States,* 325 U. S. 196, 65 S. Ct. 1120, 89 L. Ed. 1554 (1945). *Alkali* involved charges of violation of the Sherman Act by parties to an association organized under the Webb-Pomerene Act, 40 Stat. 516 (15 U. S. C. §§ 61-65). This is the Act which authorizes American exporters to associate for purposes of acting cooperatively, with the limitation, among others, that such association shall not take any action which might result in the restraint or monopolization of interstate trade or which might tend to exclude other American merchants from the export trade. The statute does not itself prohibit or render unlawful any restraint or monopolization of interstate or foreign commerce. The Federal Trade Commission is given power to investigate any alleged violation of the law and, if it should find a violation and non-compliance with its subsequent recommendations, to refer its finding to the Attorney General of the United States for proper action (15 U. S. C. § 65). It has, however, no power to hear and determine questions of violation, or to issue orders imposing penalties or requiring cessation of the violations. The only remedies were under the Sherman Act. Monopolization or restraint of interstate trade continued to constitute a violation only of the Sherman Act and not of the Webb-Pomerene Act. That these were the points upon which this Court rejected defendants' contention that

prior resort to the Federal Trade Commission was a prerequisite to antitrust action is amply substantiated by the following language (325 U. S. at 206):

> "In determining whether the Webb-Pomerene Act curtailed the then existing authority of the United States to bring antitrust suits, it is important to consider what that Act did not do, as well as what it did. True, it exempted from the antitrust laws some, but not all, acts which would otherwise have been violations. *But while it empowered the Commission to investigate, recommend and report, it gave the Commission no authority to make any order or impose any prohibition or restraint, or make any binding adjudication with respect to these violations.*" (Italics supplied.)

The Court then discussed the argument that Congress could not have contemplated concurrent jurisdiction of the Federal Trade Commission and the courts. It thereupon proceeded to say (325 U.S. at 208):

> "This argument overlooks the fact that the Commission's authority is to investigate and recommend, not to restrain violations of the antitrust laws (save as they may incidentally be violations of other statutes, which the Commission may enforce). The Commission, by its investigations and recommendations, may render a useful service in bringing violations to the attention of the Department of Justice or by showing that resort to the courts is unnecessary, either because there has been no violation or because the associations have satisfactorily corrected their trade practices. *But the Commission, under the Webb-*

Pomerene Act, does not enforce the antitrust laws; its powers are exhausted when it has referred its findings to the Attorney General. Indeed, the provisions for such reference are necessary not because the Commission has a primary jurisdiction, but only because it cannot itself enforce the antitrust laws. Further, there is no want of specific authority for the United States to enforce the antitrust laws; *the violations here alleged are not violations of the Webb-Pomerene Act, but of the Sherman Act, and it is the latter which provides for suits to be brought by the United States.*" (Italics supplied.)

United States v. *R.C.A.*, 358 U.S. 334, 79 S. Ct. 457, 3 L. Ed. 2d 354 (1958), also confirms the distinction we have drawn above between the cases announcing the supersession and primary jurisdiction rules in relation to the Shipping Act, and the cases qualifying those rules with respect to other regulatory statutes. There the Court, in passing upon the propriety of an antitrust divestiture of an acquisition approved by the Federal Communications Commission, distinguished between the limited regulation of the television industry which was there involved, and the regulation of carriers which was involved in the cases cited in opposition to antitrust jurisdiction. In the text of the opinion (358 U.S. at 346-348), the Court adverted principally to the rate regulation applicable to carriers, which would be disrupted by the exercise of coordinate antitrust jurisdiction. However, the significant point for the present case appears in footnote 16 to the opinion (358 U.S. at 347) where the Court said:

"* * * This Court in *Georgia* v. *Pennsylvania R. Co., supra,* took the position that shippers were

> entitled to have rates filed by carriers who were not parties to a conspiracy, even though the rates filed were the lowest which would be found to be reasonable. The risk that future filings would be at the uppermost limits of the zone of reasonableness was too great, and damage from the conspiratorial filings was presumed to flow. Of course, *when the agency is permitted to exempt from antitrust coverage rates filed cooperatively, the doctrine equally applies to an attack on the alleged conspiracy. United States Navigation Co.* v. *Cunard S. S. Co., supra; Far East Conference* v. *United States, supra.*" (Italics supplied.)

Thus, 6 years after *Far East Conference* and in the same year as *Federal Maritime Board* v. *Isbrandtsen,* this Court recognized that §15 is the superseding law of agreements, combinations, and conspiracies for ocean carriers.

Finally under this head, we advert to petitioner's cynical invitation to the dissenters in *Far East Conference* to vindicate their position by making this case the occasion to take advantage of the changes in the Court's membership which have occurred since 1952 (petitioner's brief, pp. 85-86, 99). Petitioner, on similar reasoning, urged the Court of Appeals to disregard *United States Navigation Co.* and *Far East Conference.* That court appropriately rejected the unseemly suggestion that it "overrule" decisions of this Court on the basis of its divination of shifts in point of view on the Supreme Bench (336 F. 2d at 656-657 and fn. 11; R. 167-168).

We respectfully urge that this Court equally firmly rebuff petitioner's morbid argument. To accept it

would be to establish a prominent position in legal research for notices of the retirements, deaths, and appointments of the Justices. The cause of the Rule of Law, rather than the Rule of Men would hardly thus be advanced. This consideration is most compelling in a commercial cause, where no great change in the understanding of broad social and economic problems has been shown to warrant a departure from established decisions.

II. The Decision Below Was Correct in Principle.

Under this head we argue that, whether it was compelled by precedent or not, the decision below should be affirmed because it was correct in principle.

A. The doctrines of supersession and primary jurisdiction are distinct.

Here, as in its arguments to the courts below, petitioner has hopelessly jumbled and confused two distinct doctrines—supersession and primary jurisdiction. Those doctrines have even been confounded with a third doctrine—exhaustion of administrative remedies.

Exhaustion of administrative remedies applies to situations in which a party to a proceeding before an administrative agency seeks to invoke judicial intervention before the administrative proceeding has run its full course.[7] Except in the most extraordinary circumstances, the courts will not interfere with the quasi-judicial process until the latter has run its full

[7] Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964).

course, *i.e.*, until the party concerned has exhausted his administrative remedies. The rationale of the doctrine is much the same as that which restricts appeals from interlocutory determinations of trial courts.

Exhaustion clearly has no application where there has been no resort to the agency. Here the question is whether the plaintiff belongs in court at all. Petitioner sued in court under the antitrust laws, and we contend, as the courts below have held, that it has no claim under the antitrust laws but, rather, a claim under the Shipping Act, which is not cognizable in a court in the first instance. In support of our position we urge the applicability of two doctrines: first, supersession, and secondly, primary jurisdiction. Supersession focuses on the interrelationship of two statutory schemes, whereas primary jurisdiction concerns itself with but one statutory scheme, the only question being: is the agency or this court the proper forum in which to initiate the action.

The primary jurisdiction doctrine does not come directly to bear on the problem until the antitrust laws have been disposed of, for those laws clearly contemplate court jurisdiction. It is the supersession doctrine which eliminates the antitrust laws from the picture.

Supersession received its first clear and articulate explanation in *U.S. Navigation Co.* v. *Cunard S.S. Co., supra,* at pp. 13-16. There, as here, the complaint charged violation of the antitrust laws. There, as here, the defendant moved to dismiss.

In its opinion upholding the dismissal of the suit, the Court analyzed the substantive prohibitions of the Shipping Act and found that they dealt thoroughly with the grievances alleged in the complaint. 284 U.S. at 483-485. It then observed that the Shipping Act also contained a remedial provision whereunder, by complaint to the agency, the plaintiff could have redress. *Id.* at 486. It noted that the relief under the Shipping Act was available whether or not the concerted action of the defendants had been approved by the agency under §15 of the Shipping Act. *Ibid.* In short, it found that Congress had enacted a specific regulatory scheme which was all-encompassing and self-sufficient insofar as concerns concerted activities of common carriers by water in the foreign commerce of the United States. It concluded that the later enactment—the Shipping Act—*pro tanto* superseded the antitrust laws. *Id.* at 485.[8] Hence the term, supersession—which is not our invention but this Court's.

An additional reason for the supersession of the antitrust laws was this Court's conviction that Congress, by the Shipping Act, had intended to commit the regulation of ocean carriers to the expert agency

---

[8] See Mr. Justice Cardozo's statement in *Terminal Warehouse Co.* v. *Pennsylvania R. R. Co.*, 297 U.S. 500, 514-515 (1936): "The Commerce Act like the Shipping Act embodies a remedial system that is complete and self-contained. * * * For the wrongs that it denounces it prescribes a fitting remedy which, we think was meant to be exclusive. * * * The opinions of this court in their fair and natural extension point to that conclusion * * * [citing, *inter alia*, *United States Navigation Co.* v. *Cunard*]" See also, McGovern, *Antitrust Exemptions for Regulated Industries*, 20 Fed. Bar J. 10 (1960); Mitchell, *Primary Jurisdiction—What It Is and What It Is Not*, Am. Bar Assn., Antitrust Section Rep., Vol. 13, pp. 26, 37-39 (1958); Ailes, *Some Procedural Problems of Primary Jurisdiction*, *Id.* 82, 86-7 (1958)

created to administer the Act, and not to diverse courts presumably having less occasion to familiarize themselves with the economic complexities attendant upon the business of the regulated carriers and their patrons. It is this aspect of the supersession doctrine which has probably given rise to the confusion between supersession and primary jurisdiction. However, we submit that the latter is not a prerequisite of the former. The essential point in determining whether the antitrust laws have any applicability is the extent to which, by later substantive and remedial provisions, Congress has manifested a purpose that anti-competitive activities of a particular industry should be dealt with under a separate law specifically enacted to govern those special activities.

Once it has been determined that the antitrust laws are inapplicable, it becomes necessary to decide whether action under the specific regulatory statute may be brought in court, or must be pursued before the regulatory agency. It is here that the doctrine of primary jurisdiction is the determining factor. The criteria for its application were most clearly stated in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922). It bears emphasis that *Great Northern* involved no question of the antitrust laws or their supersession. It did involve a determination of the nature of issues tendered under the Interstate Commerce Act which may be adjudicated by a court as well as the Commission, as contrasted with issues which, by their nature, must be resolved in the first instance by the Interstate Commerce Commission in the exercise of its technical *expertise*.

In the former category, the Court placed questions of law and of the interpretation of documents such as tariffs—the kind of questions with which courts regularly deal. In the latter category fell those questions which require for their resolution a flexible procedure for amassing an appropriate record and a background of expert knowledge of the technical and economic factors affecting the business affairs of the regulated carriers and their customers.

Great Northern was decided under the Interstate Commerce Act which, in §9, 24 Stat. 382, as amended, 49 U.S.C. §9, contemplates proceedings for damages for violation of that Act either before the I.C.C. or in a United States District Court. However, under the Shipping Act, there is provision for reparation complaints to the Commission, but *no* provision for damage suits in court. Accordingly, a party remitted to his rights under the Shipping Act can *only* obtain relief at the hands of the Commission, *regardless of the nature of the question involved.*

B. The prerequisites for the application of the supersession and primary jurisdiction doctrines are met in this case.

One predicate for the application of the supersession doctrine is that the specific regulatory statute must provide a pervasive scheme of regulation of the subject matter dealt with in the complaint—here, common carrier agreements. Section 15 of the Shipping Act, 1916, as amended prior to 1961, 39 Stat. 733, as amended, 46 U.S.C. §814 (set forth in Appendix A hereto) deals as pervasively and specifically as possible with the subject matter of concerted action of

common carriers by water in the foreign commerce of the United States. The first paragraph of §15 requires that every common carrier by water must immediately file with the Commission "a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act * * * to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements." As we shall show under a subsequent heading, this comprehensive catalog of carrier agreements was arrived at after two years of intensive congressional investigation having, as its primary objective, the discovery of the types of agreements prevalent among ocean carriers.

The second paragraph of §15 authorized[9] the Commission, by order, to disapprove, cancel or modify any agreement, "whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters,

[9] Since 1961, §15 *directs* the Commission to disapprove, cancel or modify agreements as to which the required findings are made. Sec. 15, as amended by §2 of Pub. L. 87-346, 75 Stat. 763.

importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act * * *". The Commission is directed to approve all other agreements.

The fourth paragraph of §15 provides that "agreements * * * shall be lawful only when and as long as approved by the * * * [Commission], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *".

The final paragraph of §15 provides:

> "Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Here we find a complete substantive regulation of agreements among common carriers by water. Even if a fertile imagination might conceive of a type of agreement which would not fall within one or more of the specific categories mentioned in the first paragraph of §15, or within the "catch-all" provisions of that paragraph, it suffices for present purposes that any agreement which fixes or regulates transportation rates, or controls, regulates, prevents, or destroys competition, is specifically covered. These categories certainly include the concerted action alleged in petitioner's complaint.

The succeeding paragraphs of §15 provide the clear criteria for disapproval and approval of agreements

under that section. They also provide the circumstances under which agreements will be lawful and the circumstances under which they will be unlawful *under that section of the Shipping Act.* Finally, the section sets forth a self-contained penal provision for violations.

Section 15, we submit, is a completely pervasive, substantive law regarding ocean carrier agreements. It has been described as, "in fact the antitrust law for the shipping industry". *American Union Transport* v. *United States,* 103 App. D.C. 229, 257 F. 2d 607, 610, cert. denied, 358 U.S. 828 (1958).

For the remedies available to private suitors in the event of violation of §15, reference must be made to §22 of the Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. §821) (Appendix A hereto). That section authorizes "any person" to file with the Commission a complaint, "setting forth any violation of this Act by a common carrier by water * * * and asking reparation for the injury, if any, caused thereby." If, after service on the parties charged with violation, the complaint is not satisfied, the Commission shall "investigate it in such manner and by such means, and make such order as it deems proper." The Commission "may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation."

Thus, for the violation of the system of substantive law of carrier agreements created by §15, the Congress created a complete remedial provision in §22 of the Shipping Act. That §22 calls for reparation in the amount of the exact injury suffered rather than treble damages reinforces our contention that the remedy is

exclusive. The Congress of the United States
rather knowing in the ways of the citizens of th
Republic. It would hardly, in 1916, indulge in th
idle gesture of creating a remedy in the amount
single damages for the same type of conduct whic
would incur, under a 1914 enactment, liability fo
treble damages.[10]

There is more, however, to support the exclusivenes
of the Shipping Act remedy than the attribution
Congress of an awareness of human nature. An im
portant objective of the Shipping Act, like other ac
regulating carriers, was to secure uniformity of trea
ment of patrons of the carriers. Thus, §16 of th
Act, 39 Stat. 734, as amended (46 U.S.C. §815), pr
hibits carriers from making or giving any undue
unreasonable preference or advantage to any partic
lar person, locality, or description of traffic in an
respect whatsoever. Section 17 of the Act, 39 Sta
734 (46 U.S.C. §816), prohibits rates, fares or charg
which are unjustly discriminatory between shippe
or ports, or unjustly prejudicial to exporters of th
United States as compared with their foreign comp
titors. Section 15, itself, as we have seen, requir
the Commission to disapprove agreements which a
unjustly discriminatory or unfair as between carrier
shippers, exporters, importers, or ports, etc. Th
whole objective of uniformity of treatment would
jeopardized if parties claiming to be injured by vi
lations of the Act were free to go forum-shoppin
Such was the rationale of the original primary juri
diction case, *Texas & Pacific Railway* v. *Abilene Co*

[10] The Government (Brief, p. 17), naively suggests that a shi
per may have to *elect* between reparation under the Shippi
Act and treble damages under the antitrust laws.

ton Oil Co., 204 U.S. 426, 439-442, 27 S. Ct. 350, 51 L. Ed. 553 (1907). The Court reached its result, notwithstanding the provision of §22 of the Interstate Commerce Act, 24 Stat. 387 (49 U.S.C. §22), specifically saving common law and statutory remedies, and providing that the Interstate Commerce Act remedies should be cumulative (204 U.S. at 446).

The rationale of the *Abilene Cotton Oil* case was applied in *Keogh* v. *C. & N. W. Ry. Co.*, 260 U.S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 183 (1922), as the basis for a holding that a private party seeking damages under the antitrust laws on account of a rate charged by a carrier subject to the Interstate Commerce Act should not be entertained by the Court.

In the instant proceedings, if appellant were permitted to recover treble damages as found by a jury, it would, in effect, be receiving at the hands of the court a preference as compared with other shippers who consigned parcels of evaporated milk from the Pacific Coast to the Philippines at the same time as petitioner was making its shipments. If other evaporated milk shippers brought timely treble damage suits under the antitrust laws, the various juries could not be expected to ascertain damages on a uniform theory. To the extent that other shippers' suits may be time-barred, the preference is even more certain. This would be a complete subversion of an important objective of the Shipping Act. By omitting the "saving" clause which it had placed in the Interstate Commerce Act, Congress, in §22 of the Shipping Act, was really adopting, as to common carriers by water, the doctrine of the *Abilene Cotton Oil* case.

Petitioner makes the point that the Commission, at the time of the acts charged in the complaint, had no jurisdiction whatsoever over the reasonableness of rates in foreign commerce of the United States. This is quite correct. The only section of the Act dealing with reasonableness of rates, until 1961, was §18, 39 Stat. 735, 46 U.S.C. §817. Section 18 was limited to the rates of "every common carrier by water in interstate commerce". The 1961 amendments added §18 (b)(5), 75 Stat. 765, 46 U.S.C. §817 (b)(5), authorizing the Commission to disapprove rates in foreign commerce which, "after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States."

The limited jurisdiction of the Commission over the level of rates in United States foreign commerce is beside the point. Petitioner's claim is not that the rates charged it were unreasonable. Its claim is that they were higher, by reason of unlawful concerted action, than they otherwise would have been. Inevitably, petitioner is relegated to its right under §15 of the Shipping Act. Section 15 applies with full force to the foreign commerce of the United States, which is the commerce involved in this case.

Petitioner argues (Brief, p. 67), that a private treble damage suit under the antitrust laws, unlike a suit for an injunction under those laws, will not interfere with regulation under the Shipping Act. At the same time, petitioner also argues (Brief, pp. 29-31) that the purpose of the treble damage provision of the antitrust laws is not just to compensate the injured party, but to aid in the enforcement of the antitrust laws and the attainment of *their* broad social objective. No-

where does petitioner attempt to reconcile this contradiction. It would require some ingenuity to explain how a punitive provision designed to add teeth to the enforcement of laws condemning agreements in derogation of competition would in no way interfere with the administration of the Shipping Act, which contemplates lawful agreements fixing rates, limiting competition, etc.

Far East Conference saved the shipping industry from the dilemma of having to try to conform to the dictates of two governmental agencies—the Commission and the Attorney General—issuing antithetical commands under different statutes. The industry should now be saved from the possibility of having its conduct subject to the Shipping Act become the happy hunting ground for seekers of treble damages.

The Government urges (Brief, p. 17) that the allowance of the treble damage remedy under the antitrust laws will serve as an auxiliary device to induce carriers to file their §15 agreements. Petitioner claims that it did not know of the agreements on which the complaint is based until the Commission uncovered their existence in an investigation on its own motion (F.M.C. Docket No. 872, *Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference*) (Complaint, ¶27; R. 23-24).

This case is, then, hardly the place to argue the value of private assistance in the enforcement either of §15 of the Shipping Act or of the antitrust laws. Petitioner has not led the Government to its quarry; it has been riding on the Government's coattails.

That this is not an isolated instance of inverse operation of the Government's theory is also demonstrated by the flood of private treble damage suits which were instituted *after* and in the wake of the Government's action in the *Philadelphia Electrical Equipment Manufacturers' Case, e.g., Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575 (9th Cir. 1964), and *Westinghouse Electric Corp.* v. *City of Burlington, Vermont*, 326 F. 2d 691 (D.C. Cir. 1964). While those suits may have a cumulative punitive and deterrent effect under the antitrust laws, they can hardly be said to have played a role in ferreting out antitrust violations.

The completeness of the Shipping Act program for restitution and punishment in cases of violation of § 15 negates any requirement for duplicate investigative and enforcement efforts by private parties or by an arm of the Government other than the Commission.

Petitioner urges that to remit it to its remedy under the Shipping Act is to deny it the right to a jury trial which is guaranteed by Amendment VII to the Constitution. That argument indicts this Court for a serious oversight in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553 (1907); *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477, 66 L. Ed. 943 (1922); and *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U. S 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922). All of these cases contemplated that a suitor seeking damages from a railroad on account of rates would, unless the suit turned on a pure question of law, have to press

his claim before the ICC. This was true notwithstanding the "savings" clauses in the Interstate Commerce Act (§§ 9 and 22, 24 Stat. 382, 387, 49 U. S. C. §§ 9, 22), and, in *Keogh,* notwithstanding that the suit was brought for treble damages under the antitrust laws.

Indeed, in *Keogh,* this Court referred to the differing verdicts of various juries in antitrust suits as an important reason for denying the right to antitrust relief (260 U. S. at 163). It did so even though the Plaintiff in Error there argued, as does the present petitioner, that it was entitled under the Constitution to have a jury pass upon the issues and assess the damages (260 U. S. at 159). Accordingly, the intimation of oversight is wide of the mark.

Congress is free to create substantive rights which were not known at the common law and, for those rights, to create remedies other than a suit in the nature of an action at law. It is equally free to make such a new cause of action exclusive of other rights. That is exactly what supersession means. By being limited to its rights before the Commission, petitioner would be deprived of its right to a jury trial only if some cause of action survived for which it would be entitled to demand a jury trial. However, if, as was held in *Keogh, American Union Transport,* and in the courts below, the antitrust laws have been superseded as to damage suits based on regulated carriers' agreements, then petitioner has no right to a jury trial of which it will be deprived.

Petitioner (Brief, pp. 19-20) and the Government (Brief, pp. 32-33) disagree regarding the effect of the

Commission's report and order in its Docket No. 872—*Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference* (served July 28, 1965). Petitioner asserts that the Commission's decision involved issues not presented in its antitrust suit and, in any event, that the Commission's decision is not yet final. The Government suggests that, since the Commission determined that respondents had made a number of rate-fixing agreements which remained unfiled and unapproved, the Commission has reinforced petitioner's claim (presumably, under the antitrust laws).

We submit that the Commission, having found unfiled and unapproved agreements (but not a secret agreement to dispense with the right of independent action provided in Article *Second* of F.M.C. Agreement No. 8200), has, indeed, reinforced petitioner's claim *under the Shipping Act*. If petitioner, either in lieu of, or in addition to, intervening in F.M.C. Docket No. 872, had prudently filed a timely complaint seeking reparation under the Shipping Act, instead of over-reaching for treble damages under the antitrust laws, the Commission's decision in Docket No. 872 indicates that some issues, at least, would have been resolved favorably to petitioner.

However, the Commission's decision is of no help to petitioner in its antitrust case. Unless this Court is to turn away from the supersession criteria of *United States Navigation Co.* and *Far East Conference*, the absence of filing and approval of the agreements involved is irrelevant. Petitioner's sole remedy remains a proceeding for reparation under the Ship-

ping Act. If petitioner has recklessly debarred itself from that right by gambling entirely on an outside possibility that it might get triple relief, it deserves no sympathy.

We submit that *United States Navigation Co.* and *Far East Conference* were correct in principle, and that the circumstance that the present case is a suit for treble damages under the antitrust laws presents no occasion for departing from the doctrine of those cases.

III. The Legislative History of the Shipping Act and of the 1961 Amendments Thereto Supports the Application of the Supersession Doctrine.

A. The Committee Report which was the foundation of the Shipping Act, 1916, evinces a purpose to supersede the antitrust laws as to shipping matters.

The Shipping Act resulted from an investigation conducted by the Committee on the Merchant Marine and Fisheries of the House of Representatives under the chairmanship of Hon. J. W. Alexander. The Committee conducted its investigation under successive resolutions adopted, respectively, on February 24, 1912, and June 18, 1912 (H. Res. 425, 62d Congress, 2d Session and H. Res. 587, 62d Congress, 2d Session).[11]

---

[11] These resolutions are set forth in the Committee's report, H.R. Doc. 805, 63d Cong., 2d Sess. (1914) 8-10. Because the report and the transcript of the proceedings on which it was based have become rare documents, a special joint appendix containing voluminous excerpts, with the original pagination noted, was filed in *Federal Maritime Board* v. *Isbrandtsen*, Nos. 73 and 74 in the October, 1957, term of this Court.

Prior to the adoption of the former of these two resolutions, two antitrust actions had been instituted against steamship conferences—*Thomsen* v. *Union Castle Mail S. S. Co.,* 149 Fed. 933 (C.C.S.D.N.Y. 1907); rev'd, 166 Fed. 251 (2d Cir. 1908), retried (case not reported); rev'd *sub nom., Union Castle Mail S. S. Co.* v. *Thomsen,* 190 Fed. 536 (2d Cir. 1911); rehearing 190 Fed. 1022 (2d Cir. 1911); rev'd *sub nom., Thomsen* v. *Cayser,* 243 U. S. 66 (1917), in which shippers sued the members of the conference in the South African trade under Section 7 of the Sherman Act (15 U. S. C. §15) to recover treble damages, and *United States* v. *Hamburg-American S. S. Line,* 216 Fed. 971 (S. D. N. Y. 1914); rev'd as moot, 239 U. S. 466 (1915), in which the United States instituted an antitrust suit against the conference in the Transatlantic trade. Before the adoption of the second of the two resolutions authorizing the Alexander Committee investigation, two additional antitrust suits had been instituted by the United States against the conferences in the South American trade and the Far East trade, respectively—*United States* v. *Prince Line* 220 Fed. 230 (S. D. N. Y. 1915); rev'd as moot, 242 U. S. 537 (1917) and *United States* v. *American-Asiatic Co.,* 220 Fed. 230, 235 (S. D. N. Y. 1915); rev'd as moot, 242 U.S. 537 (1917). In essence, these actions charged that the conferences paid deferred rebates, employed fighting ships, and the like. The conferences defended upon the ground that the economic factors peculiarly affecting ocean transportation justified these practices and, hence, they were not in violation of the Sherman Act.

A mere reading of the enabling resolutions carries conviction that the House acted on the assumption that

shipping conferences were violative of the best interests of the commerce of the United States; but that the House was uncertain whether such conferences violated the Sherman Act or any other law of the United States. Under the authority of these resolutions, the Committee conducted a searching scrutiny of the entire subject for a period of almost two years.

Lest there be any doubt as to the legislative climate in which the Committee operated, it should be remembered that the major portion of its labors was performed during the life of the same Congress which adopted the Clayton Act. Moreover, all of the Court decisions (excepting the District Court decision upon the second trial of *Thomsen* v. *Union Castle Mail S. S. Co., sub nom., Thomsen* v. *Cayser* (not reported, and reversed in 190 Fed. 536 (2d Cir. 1911)), rendered in the antitrust cases above referred to prior to the adoption of the Shipping Act, had held that the Sherman Act did not condemn the conferences' practices. It, therefore, might have been expected that the Committee would recommend either a broadening of the Sherman Act so as to condemn conference action beyond peradventure, or would recommend the adoption of a separate law having similar effect.

A study of the House Committee Report is persuasive that, contrary to what might have been expected, it was the purpose of the Shipping Act to remove the shipping industry from the scope of the Sherman Act and to repose in the agency administering the Act exclusive jurisdiction to prohibit acts which constitute violations of the Shipping Act.

The Committee considered the effect of activities under conference agreements upon the economic life

of the nation and, we believe to its surprise, found i
good. It set forth in its Report (H.R. Doc. 805
supra, 295-303), in elaborate summary, a statemen
of the benefits which were claimed to arise fro
conference action. It would be impossible here t
condense this important summary but we believe tha
a synopsis of these advantages is here appropriate

(1) A substantial increase in sailing opportunitie

(2) Fixed and dependable dates of sailing at reg
lar intervals.

(3) Stability of freight rates over long periods
time, with the result, among others, that t
American exporter is enabled to quote pric
and make contracts for future delivery in co
petition with foreign merchants, without fe
that instability or violent fluctuations in freig
rates will introduce a speculative element i
his bargain.

(4) Conferences are impelled by self interest to
tablish rates which will enable their Americ
shippers to compete successfully with forei
merchants in the common market.

(5) Uniform freight rates made available to
shippers irrespective of size, economic power
volume of shipments.

(6) Prevention of the elimination of weaker stea
ship lines.

(7) Maintenance of proper relationships betw
freight rates from various sources of sup
(*e. g.*, America, United Kingdom and Contine
to common foreign markets.

The Committee, however, also pointed out evils which had arisen in conference operation (H.R. Doc. 805, *supra*, 304-307). These evils consisted of abuses in which the conferences might at one time or another have indulged, but which were susceptible of correction by appropriate regulation.

Considering all of the foregoing, the Committee concluded that the real ill to which the shipping industry is subject is not the malady of monopoly and restraints on competition, but the affliction involved in cutthroat competition and rate wars. Having enumerated the advantages and considered the disadvantages of conference action, the Committee continued (H.R. Doc. 805, *supra*, 416-417):

> "These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to cooperate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition can not be assured for any length of time by ordering existing agreements terminated. *The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and and peace when several lines engage in the same trade.* Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the sur-*

vival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. *Moreover, steamship agreements and conferences* are not confined to the lines engaging in the foreign trade of the United States. They *are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.*" (Italics supplied.)

Thus, the Committee voiced its opposition to the application of the antitrust philosophy to the steamship business. The Committee, of course, was obliged to find the substitute for the antitrust approach. This it did in its recommendations (H.R. Doc. 805, *supra*, 418) as follows:

"The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, *and can only be eliminated by effective Government control;* and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of." (Italics supplied.)

Regarding carrier agreements, the Committee's recommendation No. (2) (H. R. Doc. 805, *supra,* 419-420) was that all such agreements be required to be filed with the Interstate Commerce Commission, and that the Commission be empowered to order canceled any such agreements, or any parts thereof, which it might find to be discriminating or unfair in character, or detrimental to the commercial interests of the United States. The genesis of § 15 of the Shipping Act is plain to see, even though ultimately a new agency, the United States Shipping Board, was created to administer the Act. Most significant is the absence from the Committee's report and recommendations of any intimation that there should be any continuing applicability of the antitrust laws. Since the Committee had indicated the view that those laws would deprive United States commerce of the benefits of carrier agreements, the omission is only to be expected.

B. The legislative history of the 1961 amendments demonstrates a congressional purpose to continue supersession as to Shipping Act matters.

Following *Federal Maritime Board* v. *Isbrandtsen, supra,* decided in May, 1958, the entire matter of the regulation of ocean shipping was subjected to a searching 3-year reexamination by the Congress. Report of the Committee on Merchant Marine and Fisheries, House of Representatives, to accompany H.R. 6775, H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961) (hereinafter, the "House Committee Report") 114. The Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, conducted its own separate investigation. *Id.* at 117.

The first legislative product of the hearings was H.R. 4299, 87th Cong., 1st Sess., introduced on February 15th 1961 (*Index to the Legislative History of the Steamship Conference/Dual Rate Law, Public Law 87-346 (75 Stat. 762)*, S. Doc. No. 100, 87th Cong., 2d Sess. (1962)[12] 57-67). Therein, the last paragraph of §15 of the Shipping Act was retained unamended (*Index* 63). Following further consideration, the House Merchant Marine and Fisheries Committee issued a committee print of draft revision No. 2 of H.R. 4299 on April 13th, 1961 (*Index* 69-85). In this version of the bill, the last paragraph of §15 was changed to read as follows (*Index* 78):

> "*In addition to the penalties provided by the antitrust laws* and any other laws, whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action." (Italics supplied.)

The House Committee held hearings on H. R. 4299 between March 20th and April 28th, 1961. On April 26th, 1961, Hon. Lee Loevinger, Assistant Attorney General in charge of the Antitrust Division, Department of Justice, testified to submit the Department's views on H.R. 4299. The following day he wrote to the Chairman of the Committee, enclosing a draft version of the bill "which would represent a version of the bill which the Department of Justice would not find objectionable." *Hearings Before The Special Subcommittee On Steamship Conferences of the Com-*

---

[12] Throughout, we will furnish alternate citations to this Index for 1961 legislative material as, "*Index* ".

mittee on Merchant Marine and Fisheries, House of Representatives, on H.R. 4229, 87th Cong., 1st Sess. (1961) 451-4. The Department's version of the last paragraph of §15 coincided with the Committee's draft version No. 2.

At the same hearings the Committee received the testimony of Hon. Thomas E. Stakem, then Chairman of the Federal Maritime Board. On the subject of the penalty provision of §15, Mr. Stakem stated (*Hearings, supra,* 459-60):

> "2. Draft revision No. 2 would expressly make the penalties provided by the antitrust laws and 'any other laws' applicable to any violation of sections 2, 3, and 4 of H.R. 4299, in addition to the penalties established by H.R. 4299 itself (p. 10, lines 8-9; p. 13, lines 23-24; p. 15, lines 11-12).
>
> "We believe that the penalties set forth in the act should be self-sufficient and that there should not be superimposed thereon the additional penalties of the antitrust laws and 'any other laws.'
>
> "Under draft revision No. 2 it could be argued that, even if a violation of the Shipping Act does not constitute a violation of the antitrust laws, the penalties of the antitrust laws are nevertheless applicable. Or, it might be argued that it means that where a violation of this act is also a violation of the antitrust laws or 'any other law,' the penalties of those laws would be applicable. Who is to adjudicate whether there is a violation of the antitrust laws or 'any other law'? Does this mean that *any person* is free to challenge the legality of a carrier's or other person's acts, under the antitrust laws or under the law of, say, the

State of California, by complaining to a court with jurisdiction to administer those laws? *We fear that draft revision No. 2 may erect separate and independent, and possibly conflicting, jurisdiction over shipping matters in other forums besides the Board.* Or, if it means that the Board will nevertheless have sole jurisdiction over these matters, it appears to require that the Board would have to administer not only the Shipping Act, but also the antitrust laws and any other laws.

"You will recall that section 15 of the Shipping Act, as it now reads, expressly allows for Board approval of price-fixing agreements and other agreements which violate the antitrust laws. *I do not believe that the antitrust laws can be built into the Shipping Act without introducing irreconcilable inconsistencies. It was no doubt for this reason, that the Shipping Act in its present form carves out exemptions from the antitrust laws,* ***and preempts*** *the field of shipping by placing it exclusively under the Federal jurisdiction erected in the Shipping Act.*

"In short, the language of draft revision No. 2 will invite argument that the legality or illegality of acts regulated by the Shipping Act cannot be determined by the standards of that act alone or by the Board alone, and that such acts must be held illegal if they offend against the antitrust laws, or 'any other law' as well. *It implies that State and Federal courts, as well as the Board, have independent jurisdiction over matters covered by the Shipping Act. This is at war with the traditional concept of primary jurisdiction of the Federal administrative agencies, a concept re-*

iterated time and again by the Supreme Court. It is the position of the Board that *matters falling within the ambit of the Shipping Act and brought thereby under the jurisdiction of the Board should stand or fall under the standards of that act; that violation of those standards should be punishable by penalties specified in that act; and that the administration of that act should be reposed in one Federal administrative board.*" (Italics supplied.)

Under questioning by Hon. Thor Tollefson, Mr. Stakem further testified as follows (*Hearings, supra,* 470-1):

"Mr. Tollefson. Going to another item to which you called attention, on page 4 of your statement, No. 2, you make reference to the penalty provisions on pages 10, 13, and 15, and I think the language in each case is similar.

"Mr. Stakem. Yes, sir.

"Mr. Tollefson (reading):

" 'In addition to the penalities provided by the antitrust laws and any other laws, whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.'

"I am interested in knowing where this language came from.

"As Mr. Stakem has said, this makes it possible for the Justice Department to step in, in any case, *in a way that it has not been able to do heretofore under the law and under the decisions of the Supreme Court, is that not right?*

"Mr. Stakem. I think that is true. We feel very strongly about the inclusion of the antitrust language and the 'any other law' language because I think it waters down the jurisdiction of the Board and does create any number of problems that could be litigated.

"Mr. Tollefson. Well, as you have indicated in your statement, there would be two agencies, if I might call them that. You would have the Department of Justice on the one hand and your Board on the other being able to step into any situation where there was a violation and take action independent of each other, and you might even take different action, is that so?

"Mr. Stakem. That is true.

"Mr. Tollefson. There would not be any coordination necessarily between the Department of Justice and the Board.

"Mr. Stakem. Only to the extent that the Board would, by consultation on a daily basis work with the Antitrust Division in what they were doing in a particular case.

"Mr. Tollefson. I am very much disturbed by this language principally because of the anti-American merchant marine attitude of the Justice Department.

"*The Justice Department,* quite apparently and quite evidently from its testimony here the other day, indicates that, first, it has no sympathy with the American merchant marine and second, it *does not understand the problem of international shipping at all.*

"I suppose I should put in a third one there, that *they do not seem to care to know anything about it.*

"I would be worried if this language or these penalty provisions remain in the statute. I am very curious to know how they got in the bill.

"Mr. Stakem. I can only say, Congressman Tollefson, that this language did not come from the Federal Maritime Board and I would like to add to that that we have sincerely tried in consultation with the Justice Department to reconcile the views of Justice with the views of the Board and we were not able to reconcile the views, so that I think both of us come before this committee with a full disclosure of feelings on both sides so that this committee can make an informed judgment as to what the course of action should be." (Italics supplied.)

After the hearings, Chairman Bonner, on May 3rd, 1961, introduced a "clean" bill, H.R. 6775. Therein, the last paragraph of §15 was amended to provide (*Index* 92-3):

"Whoever violates any provision of this section shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

Thus the language which might have destroyed the supersession doctrine was, after deliberation, expurgated. It never crept back in.

H.R. 6775 was further amended in committee and was the subject of the House Committee Report of June 8th, 1961. Therein, the Committee stated (House Committee Report 13; *Index* 124):

"The hearings of the committee have made it

quite clear that our traditional antitrust concepts cannot be fully applied to this aspect of international commerce."

On the Senate side, numerous amendments proposed by Hon. Estes Kefauver with a view to restoring antitrust concepts to the bill, were considered and defeated. See 107 Cong. Rec. 18235-18247 (Sept. 14, 1961); *Index* 388-423.

As enacted and approved by the President, Pub.L. 87-346 remained free of any directions to the Commission to apply antitrust concepts and, particularly, *the last paragraph of §15 remained free of any provision which would subject the regulated parties to antitrust penalties.*

From the foregoing, it is abundantly clear that both Houses of Congress were familiar with the supersession decisions. Notwithstanding appeals to legislate those decisions out of existence, the Congress refused to do so.

In effect, the 1961 amendments to the Shipping Act may be considered to have codified *U.S. Navigation Co.* and *Far East Conference,* and the cases in which they have been followed and applied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of the complaint herein should be affirmed.

Respectfully submitted,

ELKAN TURK, JR.
26 Broadway
New York, N.Y. 10004
Attorney for Respondents
Far East Conference, et al.

BURLINGHAM UNDERWOOD BARRON
WRIGHT & WHITE
HENRY F. MINNEROP
26 Broadway
New York, N.Y. 10004
Of Counsel

New York, N.Y.
October 15, 1965.

APPENDIX A

Statutory Provisions Involved

Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. §§801-844.

Sec. 15, 39 Stat. 733 (46 U.S.C. §814), prior to 1961 amendment:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
>
> The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly dis-

criminatory or unfair as between carriers, ship-
pers, exporters, importers, or ports, or betwee
exporters from the United States and their for-
eign competitors, or to operate to the detrimen
of the commerce of the United States, or to be in
violation of this Act, and shall approve all other
agreements, modifications, or cancellations.

Agreements existing at the time of the organ-
ization of the board shall be lawful until disap-
proved by the board. It shall be unlawful to
carry out any agreement or any portion thereof
disapproved by the board.

All agreements, modifications, or cancellation
made after the organization of the board shall b
lawful only when and as long as approved by th
board, and before approval or after disapproval i
shall be unlawful to carry out in whole or in part
directly or indirectly, any such agreement, mod
ification, or cancellation.

Every agreement, modification, or cancellatio
lawful under this section shall be excepted fro
the provision of the Act approved July second
eighteen hundred and ninety, entitled "An Ac
to protect trade and commerce against unlawfu
restraints and monopolies", and amendments an
acts supplementary thereto, and the provisions o
sections seventy-three to seventy-seven, both in
clusive, of the Act approved August twenty-se
enth, eighteen hundred and ninety-four, entitle
"An Act to reduce taxation, to provide revenu
for the Government, and for other purposes"
and amendments and acts supplementary theret

Whoever violates any provision of this sectio
shall be liable to a penalty of $1,000 for each da

such violation continues, to be recovered by the United States in a civil action.

Sec. 22, 39 Stat. 736 (46 U.S.C. §821):

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.